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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket #96-98

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Request of Association for Local Telecommunications Services for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic	)))))	CPD 97-30

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits these reply comments in response to the Commission's *Public Notice* in the above-referenced proceeding.[1/] As shown below, the Commission should grant the ALTS request expeditiously and should not, as some incumbent LECs have suggested, defer action to a separate proceeding.

I. Introduction

The vast majority of the parties in this proceeding agree with ALTS that traffic originated within a local calling area and terminated to an Internet service provider in the same local calling area should be treated as local traffic for purposes of determining reciprocal compensation. Only the incumbent local exchange carriers ("incumbent LECs") and their representatives take a contrary view. Yet the incumbent LECs make no effort to explain why they should be entitled to disregard the express terms of their existing interconnection agreements, previous regulatory determinations and existing statutory

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[1/] *See* "Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic," *Public Notice*, CCB/CPD 97-30, rel. Jul. 2, 1997. By a separate order, the Commission extended the reply comment deadline to July 31. *See* Order, CCB/CPD 97-30, rel. Jul. 22, 1997.

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requirements governing transport and termination. Instead, they have chosen to raise a hodgepodge of inaccurate and irrelevant arguments. The upshot of these arguments is that the incumbent LECs should not be required to pay transport and termination to competitive local exchange carriers ("CLECs") for Internet traffic because they do not want to pay.

There is no basis for the incumbent LEC claims. Treating calls to Internet service providers as local traffic for reciprocal compensation purposes is reasonable, consistent with the reciprocal compensation obligation embodied in existing interconnection agreements and within the Commission's jurisdiction. Equally important, requiring incumbent LECs to live up to the terms of their interconnection agreements also addresses their longstanding concern about recovering the costs of terminating calls to Internet service providers. Thus, the Commission should grant the ALTS request.

II. Treating Otherwise Local Calls to Internet Service Providers as Local Traffic for Compensation Purposes Is Consistent with Existing Interconnection Agreements and Regulatory Requirements.

A. Incumbent LECs Are Bound by Their Existing Interconnection Agreements to Pay Terminating Compensation for Traffic to Internet Service Providers.

At bottom, the incumbent LECs' challenge to the ALTS request is an effort to avoid obligations that they have agreed to in their existing interconnection agreements — often as a result of their own demands. As Cox demonstrated in its initial comments in this proceeding, Bell Atlantic and other incumbent LECs have entered into interconnection agreements that do not exempt traffic delivered to Internet service providers from reciprocal compensation obligations.[2] Indeed, almost without exception the incumbent LECs *drafted* the contract provisions concerning transport and termination. In some cases, they (including

[2] *See* Cox Comments at 3-8.

Bell Atlantic) have acknowledged both in arbitration hearings and other contexts that local calls to Internet service providers should be treated as local for purposes of determining reciprocal compensation obligations.[3] It is thus curious, to say the least, that they are advocating an opposite view here.

If incumbent LECs wished to avoid paying terminating compensation on local calls to Internet service providers, they could have attempted to negotiate bill and keep arrangements. Many CLECs, including Cox's affiliates, would have been glad to do so. In fact, incumbent LECs strongly resisted bill and keep arrangements, arguing that they must be compensated for their costs of terminating calls. Having successfully pursued this theory before the Commission and many state commissions, incumbent LECs cannot simply discard it when, as in this proceeding, it no longer serves their purposes.[4]

Moreover, when incumbent LECs such as Bell Atlantic have acknowledged (in negotiations, in arbitrations and in other public filings) that traffic to Internet providers is

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[3] *Id.* at 3, Exhibit 2. Despite these repeated public statements, Bell Atlantic has asserted that it does not have an obligation to pay compensation to Cox for traffic to Internet service providers and joined in the United States Telephone Association's comments opposing the ALTS request. *See* USTA Comments, Member Company Signatories list at 1.

[4] In this connection, Southern New England Telephone argues that "[t]he main assumption behind reciprocal compensation is that originating and terminating usage would balance out between the parties" and that "[r]eciprocal compensation was not meant to address [the] 'one-sided' situation" that arises when a customer's traffic flows predominantly in one direction. SNET Comments at 2-3. That, of course, is not the case: The Communications Act mandates reciprocal compensation because it recognizes that traffic will not necessarily balance out between the parties and that the party that terminates the most traffic should be compensated for its efforts. If Congress had expected that traffic would balance, it certainly could have mandated bill and keep compensation in all cases, rather than merely making it an option under Section 252(d)(2). 47 U.S.C. § 252(d)(2). Moreover, and as Cox described in its comments, there are many customers with "one-sided" traffic patterns, both as originators and recipients of calls. Cox Comments at 10-11. There is no basis for singling calls to or from any of those customers out as ineligible for terminating compensation. Rather, Congress applied the compensation obligation to all calls within a local calling area.

subject to compensation obligations, they must remain bound by those representations. This is especially important when, as in Cox's case, the terms of the provisions that defined the scope of the reciprocal compensation obligation (as opposed to the amount of the compensation) were not the subject of any arbitration proceeding and, therefore, were entered into voluntarily by both parties. Even if the incumbent LEC legal arguments in opposition to the ALTS request were correct, the contractual terms of voluntary interconnection agreements are enforceable without regard for whether they comply with the requirements of Sections 251 and 252.[5/]

B. Applying the Reciprocal Compensation Requirement to Calls Bound for Internet Service Providers Is Consistent with Applicable Regulatory Requirements.

The incumbent LECs attempt to defend their position by arguing that calls to Internet service providers are interstate access traffic and, therefore, that access charges are the only available compensation mechanism. In fact, the Commission's determinations in adopting the enhanced service provider ("ESP") access charge exemption do not lead to this conclusion and the Commission retains the regulatory power to determine how traffic to Internet service providers should be treated.

The crux of the incumbent LEC argument is that because the Commission "has held only that ISPs are to be *treated* as end users '*for purposes of the access charge system[,]*'" the only mechanism for recovering the costs of serving those customers is the charge for local business lines.[6/] That, however, is not what the Commission has held in adopting and

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[5/] *See* 47 U.S.C. § 252(a)(1), (e)(2)(A).

[6/] Ameritech Comments at 5, *quoting Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End* (continued...)

affirming the ESP exemption, or even what the quoted language says. In fact, the quoted language confirms the position taken by Cox, ALTS and most commenters in this proceeding: Internet service providers and other information services providers are to be treated as end users, and the costs of serving them are to be recovered in the same way as the costs of serving other end users.

Before the advent of the reciprocal compensation requirement, incumbent LECs recovered the costs of terminating traffic to Internet service providers through charges for local business lines and under the terms of their traffic exchange agreements with other incumbent LECs. After the 1996 Act, the costs of serving Internet service providers are recovered through the charges for local business lines and through terminating compensation paid by interconnecting carriers under negotiated or arbitrated interconnection agreements. Indeed, in their gluttonous effort to retain all of the profits from local telephone service by avoiding their obligation to pay terminating compensation with respect to local calls to Internet service providers, the incumbent LECs have failed to recognize the import of the Commission's use of the term "end users," and have focused narrowly on the rates they charge end users rather than the totality of the cost recovery mechanisms available to providers of end user services.

The second prong of the incumbent LEC attack is to assert that, because Internet traffic is jurisdictionally interstate access traffic, it must be addressed under the Part 69 rules.[7] There is no statutory or regulatory basis for this argument. While Internet traffic

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[6] (...continued)
User Common Line Charges, CC Dkt. Nos. 96-262, 94-1, 91-213 and 95-72, FCC 97-158, rel. May 16, 1997 at ¶ 348 (emphasis supplied by Ameritech).

[7] *See, e.g.*, Cincinnati Bell Comments at 2-3. Ironically, Ameritech
(continued...)

must be treated as interstate for regulatory purposes, there is no requirement that compensation for such traffic must be paid under the Part 69 rules or not at all. This notion that carriers might be deprived of the opportunity to obtain any compensation for calls they complete is simply incorrect. Moreover, the Commission has departed from its Part 69 regime when the facts justified doing so, including the ESP exemption and requiring interim access payments when CLECs use unbundled switching.[8] Indeed, because Internet traffic — unlike interstate long distance traffic — leaves the public switched telephone network (the "PSTN") at the Internet service provider's premises, it is much more logical to require compensation to be paid in the same manner and at the same rate as compensation for local traffic than to subject it to traditional access charges.[9]

Finally, the Eighth Circuit's recent decision vacating portions of the *First Report and Order* in the local competition proceeding does not materially affect the Commission's jurisdiction to act in this proceeding.[10] Almost all parties acknowledge that traffic directed

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[7] (...continued)
acknowledges that the Internet is unlike any common carrier network because the jurisdictional nature of any given transaction may be unknowable. Ameritech Comments at 14. This fact strongly suggests that applying the access charge regime is inappropriate.

[8] *See Competitive Telecommunications Assoc. v. FCC*, No. 96-3604, slip op. at 9 (8th Cir. June 27, 1997) (affirming access charge transition plan for unbundled switching) ("*CompTel v. FCC*").

[9] Cox described how Internet traffic leaves the PSTN in its comments. *See* Cox Comments at 9. Although the PSTN portion of the path taken by Internet traffic may be located wholly within a state, that does not change the jurisdictional character of the traffic, just as the Commission retains jurisdiction over interstate access traffic even though facilities are wholly intrastate. *CompTel v. FCC*, slip op. at 10 (Commission has full jurisdiction over interstate access charges).

[10] *Iowa Utilities Board v. FCC*, Nos. 96-3321 *et al.*, slip op. at 152 (8th Cir. July 18, 1997). The one issue in this proceeding that is affected by the decision is Ameritech's claim that CLECs will take advantage of most favored nation provisions to
(continued...)

to Internet service providers is jurisdictionally interstate. The Eighth Circuit decision does not affect the Commission's jurisdiction over such services. The Commission also retains the power to determine whether a service is interstate in nature based on the facts before it. Thus, the Commission has the power to act in this proceeding.

III. Affirming that Terminating Compensation Should Be Paid for Local Calls Directed to Internet Service Providers Will Address Incumbent LEC Concerns Regarding the Costs of Carrying Such Traffic.

Incumbent LECs have claimed repeatedly, in Commission proceedings and elsewhere, that they incur significant costs in terminating calls to Internet service providers and should be allowed to recover those costs. Indeed, their primary argument against continuation of the ESP exemption is that they have no way of recovering the costs of terminating calls to Internet service providers. It is thus particularly ironic that incumbent LECs are now claiming that there should be *no* terminating compensation paid to any carrier for calls to Internet service providers. In other words, they argue that costs should be recovered through traditional access charges or not at all. The Commission should reject that argument and, instead, allow incumbent LECs and CLECs to recover their costs through terminating compensation.

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[10] (...continued)
increase the compensation they receive for terminating traffic. Ameritech Comments at 16. To the extent that such provisions were arbitrated, the court held that the statute does not permit CLECs to "pick and choose" individual terms and conditions, so Ameritech's concern no longer will be relevant if that element of the decision ultimately is upheld. *Iowa Utilities Board v. FCC*, slip op. at 117. To the extent that CLECs are taking advantage of provisions that were negotiated, rather than arbitrated, Ameritech in effect is complaining that it did not recognize what it had bargained for. Given the relative size, bargaining strength and sophistication of the parties to Ameritech's interconnection negotiations, the Commission should feel no qualms about holding Ameritech to the terms of its agreements.

Using terminating compensation to recover the costs of calls to Internet service providers is perfectly consistent with normal cost recovery principles. The caller causes the costs of terminating these calls by making the calls and he or she compensates the originating carrier through local exchange charges. In many cases, and particularly for business calls, the caller also compensates the originating carrier for individual calls by paying usage charges. The terminating carrier then performs a service for the originating carrier by terminating the call and, consequently, is entitled to compensation for doing so.[11] Before the advent of local competition, there was no need to make this compensation explicit because the transactions were almost entirely internal to a single carrier. In a competitive environment, however, depriving the terminating carrier of the revenue it otherwise would be entitled to only can have the effect of inhibiting otherwise efficient competition and discouraging carriers from serving Internet service providers. Moreover, absent any indication that traffic to Internet service providers causes costs in excess of those caused by other traffic, there is no reason to set the compensation for Internet traffic at a different rate than traffic generally.[12]

In other words, granting the ALTS request will address incumbent LEC concerns regarding cost recovery for traffic to Internet service providers. This is an independent reason for the Commission to act promptly to confirm that traffic to Internet service

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11/ In most cases, the terminating carrier will be the incumbent LEC because most independent Internet service providers are served by the incumbent and because many incumbent LECs operate highly successful Internet services. Although individual CLECs may derive significant portions of their revenues from Internet service providers, CLECs do not as yet serve a significant proportion of the Internet service provider market as a whole.

12/ In fact, some analysts have suggested that traffic to Internet service providers costs the carrier less on a per minute basis than most traffic because call setup costs make it more expensive, on average, to terminate shorter calls than longer calls.

providers is subject to the same charges as any traffic terminated under the reciprocal compensation obligation.

IV. Conclusion

For all these reasons, Cox Communications, Inc. respectfully requests that the Commission act expeditiously on the ALTS Request in accordance with these reply comments.

Respectfully submitted,

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By: ______________________

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July 31, 1997

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, of the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 31st day of July, 1997, I caused copies of the foregoing "Reply Comments" to be served via first-class mail, postage prepaid (except where indicated as via hand-delivery), to the following:

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